

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

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IN THE MATTER OF )  
TOWN OF CATHLAMET, )  
 )  
Appellant, )  
 )  
v. )  
 )  
SOUTHWEST AIR POLLUTION )  
CONTROL AUTHORITY, )  
 )  
Respondent. )

PCHB Nos. 78-249 and 78-265  
FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

10 This matter, the appeal of two \$250 civil penalties for outdoor  
11 burning allegedly in violation of respondent's Section 4.01 of  
12 Regulation I came before the Pollution Control Hearings Board on  
13 March 8, 1979 in Longview, Washington. Hearing examiner William  
14 A. Harrison presided alone. Appellant was represented by its  
15 attorney, Fred A. Johnson. Respondent was represented by its attorney,  
16 James D. Ladley. Olympia reporter Jennifer J. Roland recorded the  
17 proceedings. Respondent elected a formal hearing pursuant to RCW 43.21B.23  
18 Witnesses were sworn and testified. Exhibits were examined.

1 The Board having read the transcript of the proceedings, having  
2 examined the exhibits, having considered the records and files herein  
3 and having reviewed the Proposed Findings of Fact, Conclusions of Law  
4 and Order of the Presiding Officer; and

5 The Board having received Exceptions to said Proposed Findings  
6 of Fact, Conclusions of Law and Order from the appellant, Town of  
7 Cathlamet, on April 10, 1979, and having considered and denied  
8 appellant's Exceptions, the Board makes these

9 FINDINGS OF FACT

10 I

11 Respondent, pursuant to RCW 43.21B.260, has filed with this  
12 Board a certified copy of its Regulation I containing respondent's  
13 regulations and amendments thereto of which official notice is taken.

14 II

15 Appellant, Town of Cathlamet, owns a parcel of land commonly  
16 known as the town dump. This is a dumping site for refuse from both  
17 the Town and eastern Wahkiakum County.

18 The appellant has entered into a contract with one Stanley  
19 Sanitary Service under which Stanley:

20 . . . shall supervise and maintain the city  
21 dump, or other place provided for the disposal  
22 of such materials, maintaining the same in  
23 good condition at all times . . . (Paragraph  
24 9, p. 2 of the contract entered into June 1972,  
25 Exhibit A-3).

26 The contract also gives Stanley the right to collect fees from members  
27 of the public who bring refuse to the town dump and to collect garbage  
in the Town of Cathlamet in return for a fee from the residents.

FINAL FINDINGS OF FACT,  
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III

2 On October 9, 1978 at 12:03 p.m. respondent's inspector, while  
3 on route to an air quality monitoring station, saw "billows of white  
4 smoke" arising from the town dump. He saw no one at the scene and  
5 did not enter the dump site. Rather, he went to the Cathlamet Town  
6 Hall and issued a Field Notice of Violation to the Town Clerk, requesting  
7 that the fire be extinguished. The smoke impaired the inspector's  
8 driving visibility while in Cathlamet and continued without interruption  
9 from his first observation until his departure after issuing the  
10 Field Notice of Violation.

11 On November 14, 1978, respondent dispatched another inspector  
12 to observe the same site. Arriving at 10:45 a.m. the inspector  
13 observed a fire with smoke and visible orange flame which  
14 emanated from a pile of garbage and refuse some twenty feet in  
15 diameter and located within the town dump. Although he had no  
16 search warrant, the inspector observed an open roadway leading into  
17 the dump, saw no watchman and proceeded to enter the dump. There he  
18 talked with persons, identity unknown, and ascertained that no one  
19 from the Town was present on the site. He therefore also drove to  
20 the Town Hall in Cathlamet, and issued a Field Notice of Violation  
21 to the Town Clerk, requesting that the fire be immediately extinguished.  
22 At 9:30 a.m. the following day, November 15, 1978, the fire was still  
23 smoldering and smoking.

24 Respondent did not issue any permit for the fire on either  
25 October 9 or November 14, 1978, and both were probably ignited by  
26 spontaneous combustion.

27 FINAL FINDINGS OF FACT,  
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1 Appellant later received two Notices of Violation each assessing  
2 a civil penalty of \$250, total \$500. From these, appellant appeals.

3 IV

4 There is a lengthy prior record of refuse fires in the  
5 Cathlamet Town Dump. Respondent has issued field notices of  
6 violation to the appellant, concerning such fires, on the following  
7 dates:

- 8 1. March 25, 1971
- 9 2. March 16, 1973
- 10 3. July 6, 1976
- 11 4. July 9, 1976
- 12 5. July 12, 1976
- 13 6. July 23, 1976
- 14 7. June 29, 1977
- 15 8. November 23, 1977
- 16 9. February 23, 1978
- 17 10. June 23, 1978

18 In response to this situation, the appellant has provided a cable  
19 and padlock across the dump entry road in an attempt to limit those  
20 times when the public is admitted to the dump. The appellant has  
21 also applied to respondent for a variance to allow open burning at  
22 the town dump, which variance was not granted. Presently, the appellant  
23 is working with the Cowlitz-Wahkiakum Governmental Conference to  
24 develop a Solid Waste Plan. This Plan is scheduled for completion  
25 in early 1980 and may eventually result in closure of the present  
26 town dump. Efforts to locate a sanitary landfill are hampered, however,  
27 by the fact that, according to the Governmental Conference, 95% of  
the soil in eastern Wahkiakum County is unsuitable for such a  
landfill due to the soil's leaching characteristics. It may prove  
feasible to haul Wahkiakum County refuse to a Cowlitz County sanitary

landfill.

V

The Board of Wahkiakum County Commissioners signed a written resolution, effective April 15, 1968, activating the respondent's air pollution control authority within Wahkiakum County and all the cities and town within its boundaries. This written resolution was prepared and presented by the Prosecuting Attorney for Wahkiakum County, is attested by the County Auditor, and a certified copy was duly filed, on April 16, 1968, in the Office of the Secretary of State in Olympia.

This written resolution states that the Board of Wahkiakum County Commissioners gave due consideration to existing and future air pollution problems and found that city or town ordinances and county resolutions were then inadequate to prevent or control air pollution. The resolution further states that the Board of Wahkiakum County Commissioners conducted a public hearing on April 8, 1968 in accordance with the then prevailing rule on public meetings, chapter 42.32 RCW. Respondent exercises control of air pollution in Wahkiakum County in reliance upon this document.

The actual minutes of the April 8, 1968, special meeting of the Board of Wahkiakum County Commissioners make no mention of air pollution.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 to these

2 CONCLUSIONS OF LAW

3 I

4 Respondent's rule on open burning, Section 4.01 of Regulation I  
5 which was cited in the Notices of Violation, provides:

6 Open Fires: No person shall ignite, cause to  
7 be ignited, permit to be ignited, or suffer, allow,  
8 or maintain any open fire within the jurisdiction  
of the Authority, except as provided in this  
Regulation.

9 (a) The following fires are excepted from  
10 provisions of this regulation:

11 (1) Fires set only for recreational  
12 purposes and cooking of food for human  
consumption, provided no nuisance is  
created.

13 (2) Any fire specifically exempt under  
14 Section 42, of Chapter 238, RCW 70.94.250.

15 (b) Open burning may be done under permit:

16 (1) Application for burning permits shall  
17 be on forms provided by the local fire  
department.

18 (2) No permit shall be issued unless the  
Control Officer is satisfied that:

19 (i) No practical alternate method is  
20 available for the disposal of the  
material to be burned.

21 (ii) No salvage operation by open  
22 burning will be conducted.

23 (iii) No garbage will be burned.

24 (iv) No dead animals will be disposed  
of by burning.

25 (v) No material containing asphalt,  
26 petroleum products, paints, rubber products,  
plastic or any substance which normally  
emits dense smoke or obnoxious odors will  
27 be burned.

1 (3) Any permit issued may be limited by the  
2 imposition of conditions to:

3 (1) Prevent air pollution.

4 (11) Protect property and the health,  
5 safety and comfort from the effects of  
6 the burning.

7 (4) If it becomes apparent at any time to  
8 the Control Officer that limitations need  
9 to be imposed for any of the reasons stated  
10 in Subsection (3) above, the Control Officer,  
11 or his duly designated agent shall notify the  
12 permittee and any limitation so imposed shall  
13 be treated as conditions under which the permit  
14 is issued.

15 (c) Fires started in violation of this regulation  
16 shall be extinguished by the persons responsible for the  
17 same upon notice of the Control Officer or his duly  
18 designated agent. When the Control Officer has knowledge  
19 of adverse conditions for the dispersement of the by-products  
20 of combustion, an air pollution alert may be declared voiding  
21 all permits for open fires.

22 (d) It shall be (Prima facia) [sic] evidence that the  
23 person who owns or control property on which an open fire,  
24 prohibited by this regulation, occurs has caused or allowed said  
25 open fire.

26 Appellant, Town of Cathlamet, urges that it did not violate respondent's  
27 open burning rule, Section 4.01; and, in addition, advances the  
28 defense that respondent does not possess jurisdiction to function  
29 within Wahkiakum County and that therefore the Notices of Violation  
30 issued by respondent are null and void. At hearing, appellant also  
31 challenged the inspector's entry into the town dump on November 14,  
32 1978, without a search warrant. We take these up in order.

33 II

34 Section 4.01 of Regulation I. The two outdoor fires in this  
35 appeal, October 9 and November 14, 1978, are prohibited by respondent's  
36 Section 4.01(b). This is so either because the fires were burned

37 FINAL FINDINGS OF FACT,

1 without respondent's permit or because they contained prohibited  
2 materials (garbage or other material emitting dense smoke).

3 The respondent has made a prima facie case by showing that these  
4 prohibited fires took place on property owned by the appellant.  
5 Section 4.01(d). There was further affirmative proof that the fires  
6 were not put out promptly. While the appellant did not deliberately  
7 set the fires in question, we have long held that one may "cause or  
8 allow" a fire by failing to take reasonably prudent precautions to  
9 put the fire out. Burlington Northern RR v. PSAPCA, PCHB No. 100  
10 (1972), A-1 Auto Wrecking v. PSAPCA, PCHB No. 337 (1973) and Northwest  
11 Pipe and Steel v. PSAPCA, PCHB No. 468 (1974). In this case, appellant  
12 has not gone forward with proof showing, specifically, that any  
13 effort was made to extinguish the two fires involved in this appeal.  
14 Moreover, despite the past history of fires at the same site,  
15 appellant has not shown that at the times of the two fires now  
16 before us any specific plan existed for combating this chronic and  
17 recurring type of fire. Such a plan would include, at minimum,  
18 a) a means for early detection of the fire and b) a source of water  
19 or other fire fighting medium, in adequate supply, on or near the site.

20 Appellant next urges that any omission in this matter is solely  
21 that of Stanley Sanitary Services with whom appellant has a contract  
22 calling for supervision of the dump where these fires occurred. We  
23 disagree. The relation between appellant and Stanley is that of  
24 principal and agent and, as such, vicarious liability can be imposed  
25 upon appellant for the omissions of Stanley. Gelb v. PSAPCA,  
26 PCHB No. 994 (1976). Stanley failed to take reasonably prudent

precautions to put out the two fires in question.

2 Appellant finally urges that it cannot be liable in that it did  
3 not "knowingly" cause air pollution as that term is used in  
4 RCW 70.94.040 of the State Clean Air Act. We disagree. First,  
5 the quantity of smoke coupled with actual notice from respondent  
6 establishes that appellant did knowingly cause air pollution via  
7 failing to take reasonably prudent precautions to put out the two fires  
8 in question which it knew of, notwithstanding that the fires were not  
9 knowingly ignited by appellant. Second, it is not necessary to prove  
10 that an illegal fire was knowingly caused in order to invoke a civil  
11 penalty. Scienter was omitted from the amendment to the State Clean Air  
12 Act, chapter 70.94 RCW, which created civil liabilities for violations,  
13 indicating the Legislature intended to omit such a requirement for  
14 civil violations. RCW 70.94.431. Kaiser Aluminum v. PSAPCA, PCHB No.  
15 1017 (1976).

16 We conclude that appellant violated respondent's Section 4.01 of  
17 Regulation I on both October 9 and November 14, 1978.

### 18 III

19 Geographical Jurisdiction and Search Warrant. Appellant points  
20 out that the Board of Wahkiakum County Commissioners' Minutes do  
21 not reflect the public hearing required by RCW 70.94.055 and  
22 RCW 42.32.010, both as existing in 1968, for activation of respondent  
23 air authority. From this, appellant contends that there was no such  
24 public hearing or that it was not lawful. We conclude to the contrary.  
25 The reason that appellant chooses 1968 to conduct its search of the  
Commissioners' Minutes is because of the written resolution of that

27 FINAL FINDINGS OF FACT,  
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1 date expressly declaring that a public meeting was held and resolving  
2 that the respondent air authority be activated within Wahkiakum  
3 County and all of its cities and towns (Exhibit R-1). This written  
4 resolution itself, signed by the Commissioners and filed in the Office  
5 of the Secretary of State, is a sufficient written record to prove  
6 compliance with the public meeting and minute-keeping requirements  
7 of chapters 70.94 and 42.32 RCW.

8 Respondent's inspector observed the prohibited fire from a public  
9 roadway on November 14, 1978, which observation required no search warrant.  
10 This observation, and other evidence in the case, is sufficient to  
11 sustain that violation independently and without resort to the inspector's  
12 entry into the town dump. Notwithstanding this, the inspector's entry into  
13 the town dump occurred while it was apparently open to the public and no  
14 search warrant was required.

15 IV

16 Any Finding of Fact which should be deemed a Conclusion of Law  
17 is hereby adopted as such.

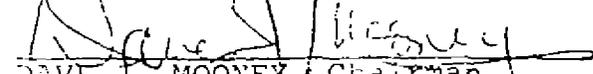
18 From these Conclusions, the Board enters this

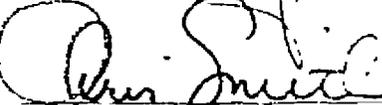
19 ORDER

20 Two \$250 civil penalties are each affirmed.

21 DATED this 29<sup>TH</sup> day of June, 1979.

22 POLLUTION CONTROL HEARINGS BOARD

23   
24 DAVE J. MOONEY, Chairman

25   
26 CHRIS SMITH, Member

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW,  
AND ORDER